BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
***DR. CHRISTOPHER NELSON*,**
ID. NO. 02-116356-00 1, NO. 98-18
PROTEST TO ASSESSMENT NOS. 2115295,
AND 691910 THROUGH 691916

DECISION AND ORDER

This matter came on for formal hearing on February 19, 1998 before Gerald B. Richardson, Hearing Officer. Dr. Christopher Nelson, hereinafter, "Dr. Nelson", represented himself at the hearing. The Taxation and Revenue Department, hereinafter, "Department", was represented by Bruce J. Fort, Esq. At the close of the hearing, the record was held open for Dr. Nelson to submit additional information concerning income tax filings in prior years. The record was supplemented with that information on March 11, 1998, and the matter was considered submitted for decision at that time. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On February 27, 1997, the Department issued Assessment No. 2115295 to Nelson Chiropractic Evaluation & Treatment Center, New Mexico tax identification no. 02-116356-00 1 in the total amount of $68,655.29; consisting of $36,692.74 in gross

receipts tax, $18,346.60 in penalty and $13,615.95 in interest for the reporting periods of March, 1992 through December, 1996.

2. Although Dr. Nelson had retired the tax identification number for Nelson Chiropractic Evaluation and Treatment Center in February of 1992, the Department issued Assessment No. 2115295 under the tax identification number for Nelson Chiropractic Evaluation and Treatment Center based upon the evidence it had in the form of yellow pages advertisements from the U.S. West directory for Albuquerque, New Mexico for the years 1994, 1995 and 1996 which indicated that Dr. Nelson was advertising himself as a chiropractic physician. Rather than create a new tax identification for Dr. Nelson for reporting gross receipts from performing chiropractic services, the Department used Dr. Nelson's former tax identification number.

3. Dr. Nelson, through Nelson Chiropractic Evaluation and Treatment Center, had reported gross receipts taxes to the Department through February of 1992, until he retired that tax identification number with the Department. Subsequent to that time, Dr. Nelson filed no returns or reports with the Department reporting receipts from performing chiropractic services and paid in gross receipts tax.

4. During calendar year 1991, Nelson Chiropractic Evaluation and Treatment Center reported gross receipts to the Department in amounts ranging from $3,000 to $9,000 per month.

5. Assessment No. 2115295 is a provisional assessment, which estimated Dr. Nelson's gross receipts from engaging in the business of rendering chiropractic services, because no returns reporting actual receipts were filed by Dr. Nelson. In order to protect the interests of the state in collecting all taxes owing, the Department estimated Dr.

Nelson's gross receipts to be $10,900 per month for the reporting periods of March, 1992 through December, 1996. This figure was calculated by doubling the amount of gross receipts reported on average during the calendar year 1991. It also assessed a 50% of tax fraud penalty, plus interest on the amount of estimated unpaid taxes.

6. The initial check of the Department's records for income tax filing and reporting indicated that the Department had no record that Dr. Nelson had filed and reported personal income taxes for tax years 1989 through 1995. For tax years 1989 through 1991, the Department used the actual gross receipts Dr. Nelson reported to the Department for those years to estimate his taxable income for those tax years. For tax years 1992-1995, the Department used the $10,900 figure it had used as Dr. Nelson's estimated monthly gross receipts to estimate the amount of Dr. Nelson's taxable income for those tax years. It then calculated the personal income tax it estimated Dr. Nelson to owe by applying an 8% tax rate to Dr. Nelson's estimated taxable income to arrive at income tax owing. The Department also assessed a 50% fraud penalty and interest on the amount of its estimated unpaid taxes.

7. On March 28, 1997, the Department mailed Assessment Nos. 691910 through 691916 for tax years 1989 through 1995 to Dr. Nelson, assessing personal income tax, penalty and interest as follows:

Year	Income	Tax	Penalty	Interest	Total
1989	16,956	1,356.48	678.24	1,390.39	3,425.11
1990	84,392	6,751.36	3,375.68	5,907.44	16,034.48
1991	65,936	5,274.88	2,637.44	3,824.29	11,736.61
1992	131,880	10,550.40	5,275.20	6,066.48	21,892.08
1993	131,880	10,550.40	5,275.20	4,483.92	20,309.52
1994	131,880	10,550.40	5,275.20	2,901.36	18,726.96
1995	131,880	10,550.40	5,275.20	1,318.80	17,144.40

8. On March 18, 1997, Dr. Nelson filed a timely, written protest to Assessment No. 2115295 with the Department.

9. On April 30, 1997, Dr. Nelson filed a written protest to Assessment Nos. 691910 through 691916 with the Department. That protest became timely when, on June 27, 1997, the Department granted a retroactive extension of time to file a protest to those assessments.

10. In order to more accurately determine the amount of gross receipts and personal income tax for which Dr. Nelson may be liable, the Department served interrogatories and requests for production upon Dr. Nelson requesting that he identify all income received during tax years 1993-1996 and requesting that Dr. Nelson provide books of account, financial statements, general ledgers, bank statements, check registers and other financial documents which would be relevant to determining Dr. Nelson's income and gross receipts.

11. Dr. Nelson's answers to the interrogatories and requests for production were not responsive. As a result of a Motion to Compel full and complete responses to the Department's interrogatories and request for production, Dr. Nelson was ordered to respond in a full, responsive and complete manner.

12. Dr. Nelson declined to respond as ordered. Instead, Dr. Nelson elected to waive any arguments he might make about the amount of the Department's assessments and to present his case on legal theories challenging the Department's jurisdiction to impose tax, and the hearing was allowed to proceed accordingly.

13. As a result of Dr. Nelson's testimony at the formal hearing, a more thorough search of the Department's income tax records was made and it was discovered that Dr.

Nelson did file New Mexico personal income tax returns for tax years 1989 and 1990 and the parties agreed that the record could be supplemented with copies of those returns.

14. Dr. Nelson's 1989 New Mexico personal income tax return revealed that in 1989, Dr. Nelson had a loss in the amount of $9,359 of federal adjusted gross income, and that no taxes were owing for that year. The federal Schedule C form included with Dr. Nelson's 1989 return indicated that he had $54,015 in gross receipts from his business, called Nelson Chiropractic Center, but that his business expenses exceeded his business income, resulting in a loss of $9,610.

15. Dr. Nelson's 1990 New Mexico personal income tax return revealed that in 1990, Dr. Nelson had $12,440 in federal adjusted gross income, and that his 1990 personal income tax liability was $22, which was paid with the filing of the return.

16. The Department obtained Dr. Nelson's social security number, 410-90-0778, under which the personal income tax assessments were issued, from the Department's New Mexico driver's license records.

17. On July 16, 1992, Dr. Nelson recorded in the Bernalillo County, New Mexico records an "Affidavit of Revocation and Rescission" purporting to revoke, rescind, cancel and render null and void *ab initio* Dr. Nelson's social security application which caused social security number 410-90-0778 to be established for him. The affidavit also declared Dr. Nelson's position that he was not subject to or liable for federal income tax. Dr. Nelson mailed a copy of his affidavit to the United States Department of Treasury and provided a set amount of time for them to respond to or rebut the statements in his affidavit.

18. Dr. Nelson has lived primarily in New Mexico since 1988, having no residence outside of New Mexico since moving here in 1988.

19. Dr. Nelson has had a New Mexico driver's license since 1989.

20. Dr. Nelson has been registered to vote in New Mexico at various times since moving to New Mexico. From 1989-1996, Dr. Nelson was not registered to vote in any other states other than New Mexico.

21. Dr. Nelson has been licensed as a chiropractic physician in New Mexico since 1988.

22. Sometime in 1992 Dr. Nelson came to hold the belief that he was not required by law to register with the Department and to file and pay gross receipts taxes on the moneys he received from performing chiropractic services in New Mexico. This was the reason he retired the tax identification number he had previously had with the Department under Nelson Chiropractic and Evaluation Center and ceased to report gross receipts or pay gross receipts taxes to the Department.

23. At approximately the same time, Dr. Nelson came to believe that he is not required to file a federal income tax return declaring as income the money he received from performing chiropractic services. As a result of this belief, Dr. Nelson also believed that he was not required to file New Mexico personal income tax returns. He filed no income tax returns with the Department for tax years 1991 through 1996.

24. During the period from February, 1992 through 1993, Dr. Nelson performed chiropractic services in New Mexico while acting as a minister of a Universal Life Church congregation. All money paid him for performing chiropractic services was donated to the Universal Life Church.

25. During calendar years 1994, 1995 and 1996, Dr. Nelson performed chiropractic services in New Mexico and had gross receipts from performing chiropractic services in New Mexico.

DISCUSSION

Dr. Nelson has raised numerous arguments protesting the Department's assessments of both personal income tax and gross receipts tax. Those two tax programs and the assessments under them will be discussed separately in the context of this decision. Dr. Nelson raised an issue concerning the burden of proof with respect to both tax programs, however, so it will be discussed first.

Dr. Nelson argues that the presumption of correctness of assessments of tax applies only to the amount of tax assessed and would not apply to the issue of whether jurisdiction to impose tax exists. As authority for this argument, Dr. Nelson cited 5 U.S.C. § 556(d), a provision of the federal administrative procedure act, which provides in pertinent part that, "[E]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." This provision, however, has no applicability to the proceedings herein. In the first place, the federal administrative procedures statutes have no applicability to administrative proceedings being conducted pursuant to state law. This is made clear by the definition of "agency" in 5 U.S.C. § 551(1), which provides in pertinent part that, "'agency' means each authority *of the government of the United States,..."* (emphasis added). The New Mexico Taxation and Revenue Department is an agency of the government of the state of New Mexico, not the federal government. Hearings of protests to assessments of tax by the Department are governed by § 7-1-24 NMSA 1978, which is a provision of the Tax Administration Act, §§ 7-1-1 *et seq.* NMSA

1978. The Tax Administration Act applies to and governs the administration and enforcement of taxes under many of the statutes the Department is charged with administering, including the Income Tax Act and the Gross Receipts and Compensating Tax Act. ***See,*** § 7-1-2(A)(1) and (3) NMSA 1978.

This decision maker has no quarrel with the concept that jurisdiction to tax must exist with respect to the imposition of tax by a government and it is beyond cavil that jurisdiction to tax is an issue which can be raised in defense against any assessment of tax. That does not resolve, however, the issue of who has the burden of proof with respect to jurisdiction to tax.

Section 7-1-17(C) NMSA 1978 is the provision of the Tax Administration Act which provides for the presumption of correctness of tax assessments issued by the Department. It states simply that, "any assessment of taxes or demand for payment made by the department is presumed to be correct." The language is quite broad. It contains no language which would limit the presumption to the amount of tax, but not the basis for imposition of tax. Dr. Nelson's argument would have us read language into the statute which the legislature did not enact. This, courts should not do, especially when the statute makes sense as written. ***Burroughs v. Board of County Commissioners of Bernalillo County,*** 88 N.M. 303, 540 P.2d 233 (1975). Thus, a reasonable interpretation of § 7-1-17(C) is that Dr. Nelson bears the burden of proving his allegation of lack of jurisdiction to impose tax under both of the tax programs at issue.

THE GROSS RECEIPTS TAX ASSESSMENT WAS PROPER

Dr. Nelson's first defense to the imposition of gross receipts tax upon his receipts from performing chiropractic services in New Mexico is that there is no provision in the New Mexico statutes which requires him to be registered to report and pay such taxes.[1] In making this argument, Dr. Nelson relies upon § 7-10-4 of the Gross Receipts Tax Registration Act, §§ 7-10-1 to 7-10-5 NMSA 1978, which provides:

> Any person leasing or selling property *to the state or performing services for the state,* as those terms are used in the Gross Receipts and Compensating Tax Act, shall be registered with the department to pay the gross receipts tax unless that person has no business location, employees or property in New Mexico and does not conduct business in New Mexico through agents or contractors. (emphasis added).

Dr. Nelson argues that this is the only provision of state law which imposes a requirement to register and pay gross receipts taxes. Since he does not lease or sell property to the state nor perform services for the state, there is no provision of law requiring him to register and pay gross receipts taxes on his receipts from performing chiropractic services.

It is not disputed that the Gross Receipts Tax Registration Act does not apply to Dr. Nelson. Section 7-10-2 provides that the purpose of the act, "is to ensure that all persons doing business *with the state,*...are registered with the department for payment of the gross receipts tax." (emphasis added). Because Dr. Nelson does not do business with the state, the act would not apply to him.

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[1] Although the Department's assessment of gross receipts tax was a provisional assessment based upon estimates of the amount due because Dr. Nelson failed report his own taxes and declined to make his books and records available to the Department in the course of these proceedings, Dr. Nelson waived his right to dispute the amount of the Department's assessment of tax when he refused to comply with the Order of this hearing officer to provide information which would have assisted in determining a more accurate amount of tax.

Dr. Nelson errs, however, when he argues that there is no other provision of state law requiring that he be registered to pay gross receipts taxes. Section 7-1-12(A) of the Tax Administration Act, which, as noted above, applies to taxes administered under the Gross Receipts and Compensating Tax Act, provides as follows:

> The director by regulation shall establish a system for the registration and identification of taxpayers and shall require taxpayers to comply therewith.

Pursuant to the authority granted by Section 7-1-12, the Secretary has promulgated regulation 3 NMAC 1.1.15.1 which provides as follows:

> The secretary shall cause to be developed and maintained multiple systems for the registration and identification of taxpayers *who are subject to taxes or tax acts listed in Section 7-1-2 and taxpayers shall comply therewith.* The systems shall include application forms combining tax programs whenever feasible. The systems shall include an identification number for each individual taxpayer using a state assigned number, federal social security number, federal employer identification number or a combination of these numbers for cross-reference purposes. The systems shall be devised to facilitate the exchange of information with other states and the United States, and to aid in statistical computations. Nothing contained in Section 7-1-12 precludes the secretary from utilizing electronic data processing programs to manage registration and identification systems. (emphasis added).

Because the Gross Receipts and Compensating Tax Act is a tax act listed in Section 7-1-2, this regulation applies to taxpayers under that tax program and requires their compliance with the Department's registration system for that tax program. That such a system exists cannot be disputed by Dr. Nelson. At one time, he was registered and paid tax under that system. It was only his own action to retire his identification number which removed him from the system.

It should also be noted that not only is Dr. Nelson required to be registered pursuant to the Department's registration system, he is also subject to the imposition of gross receipts tax when he engages in the business of performing chiropractic services in New Mexico. This is because § 7-9-4 NMSA 1978 imposes an excise tax referred to as the gross receipts tax upon the gross receipts of any person engaging in business in New Mexico for the privilege of engaging in business. Engaging in business is broadly defined at § 7-9-3(E) to mean, "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." Gross receipts are defined, among other things, to be the amount of money received from performing services in New Mexico. § 7-9-3(F). Because Dr. Nelson had gross receipts from performing chiropractic services in New Mexico during the periods assessed, he was subject to tax.

Dr. Nelson's next argument is based upon the fact that the gross receipts tax is an excise tax imposed upon the privilege of engaging in business. Dr. Nelson asserts that if he were a corporation, which had been granted a privilege by the government in the form of being granted the rights associated with incorporation, that the government would have the right to impose a tax on the privilege of engaging in business as a corporation. As a citizen, however, Dr. Nelson argues that he has not requested, obtained or exercised any privilege granted by the government and thus, he cannot be taxed for the exercise of any privilege. This argument is without merit. Both individual citizens as well as corporations can be granted the privilege of engaging in business in New Mexico. This argument is so meritless, that it has never even been argued before with respect to New Mexico's gross receipts tax. The identical argument has, however, been raised by those in the tax protester movement with respect to the imposition of federal income taxes, and

has been uniformly rejected. As stated by the court in ***Lovell v. U.S.,*** 755 F. 2d 517, 519 (7th Cir., 1984), "[A]ll individuals, natural or unnatural, must pay federal income tax on their wages, regardless of whether they received any 'privileges' from the government."

In a related argument, Dr. Nelson argues that the right of a citizen to pursue his chosen calling is such a fundamental right that the government cannot impose a charge on the enjoyment of such a right. In support of this argument, Dr. Nelson cites to ***Butcher's Union, ETC., Co. v. Crescent City, Etc. Co,*** 111 U.S. 746 (1884), and ***Murdock v. Commonwealth of Pennsylvania,*** 319 U.S. 105 (1943). These cases cannot be read so broadly as Dr. Nelson does. The ***Butcher's Union*** case involved whether the Louisiana legislature could grant, in perpetuity, a monopoly which could not be altered by future legislatures. In a concurring opinion, Justice Bradley, in *dicta*, wrote that the state may not completely *prohibit* a person from pursuing his calling, which is what was involved in that case because the grant of the monopoly acted to prohibit the other slaughter house from engaging in that business. It made no statement about the state being able to condition the exercise of such a privilege, which the law allows. The ***Murdock*** case makes clear that the imposition of a tax does not necessarily act impermissibly upon the exercise of constitutionally protected right. That case involved a challenge to a municipal ordinance which required persons soliciting orders for goods or merchandise acquire a business license to do so. The ordinance was challenged by a religious group distributing religious literature as violating its first amendment rights to the free exercise of religion and freedom of speech.[2] The Court stated:

[2] These rights are explicitly recognized in the Constitution and, arguably, are entitled to far greater protection than the right to pursue one's calling, which is not mentioned in the Constitution at all.

> We do not mean to say that religious groups and the press are free from all financial burdens of government. See G*rosjean v. American Press Co.,* 297 U.S. 233, 250. We have here something quite different, for example from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.

Id., 319 U.S. at 112. Thus, it is clear that not all forms of taxation which affect the exercise of even the most fundamental of constitutional rights are prohibited. Far more pertinent to the inquiry at bar, the allegation that the government may not impose a tax on the privilege of engaging in business, are the numerous federal income tax cases which have upheld the imposition of an excise tax in the form of the federal income tax on the income generated from engaging in business. With respect to the right to engage in business, which is what New Mexico's gross receipts tax is imposed upon, it has long been established in the law that the government may impose an income tax upon income from engaging in business. ***Flint v. Stone Tracy Co.,*** 220 U.S. 107 (1911), ***Brushaber v. Union Pacific Railroad***, 240 U.S. 1, (1916). Thus, there is no constitutional prohibition to imposition of New Mexico's gross receipts tax upon the privilege of engaging in business in New Mexico.

Dr. Nelson's final argument with respect to the gross receipts tax assessed is that he is not doing business under the name and tax identification number that the assessment was issued under, since he retired both of them in 1992, and so the assessment does not apply to him. This argument is also without merit. Dr. Nelson retired his tax number under the erroneous belief that he was not subject to gross receipts tax. He continued to

engage in business, however. The Department had the option of creating a new tax identification number for Dr. Nelson or of using the old, erroneously retired number. In either case, especially since Dr. Nelson operates as a sole proprietor, Dr. Nelson is the person who is liable for the assessment of tax, no matter which name is given or which identification number is attached to the assessment.

DR. NELSON IS SUBJECT TO NEW MEXICO PERSONAL INCOME TAX

Prior to discussing Dr. Nelson's arguments as to why he is not subject to income tax on his earnings from performing chiropractic services in New Mexico, an examination of New Mexico's personal income tax statutes and their operation will be useful. New Mexico imposes its income tax upon the net income of "every resident individual". New Mexico is among the majority of states which "piggy-back" or use the federal income tax system as the basis for calculating state income taxes. The calculation of personal income taxes in New Mexico begins with a determination of "base income" which is defined to be the taxpayer's "adjusted gross income" as defined in Section 62 of the Internal Revenue Code, plus certain net operating loss deductions which can be deducted for federal purposes in arriving at federal adjusted gross income but which New Mexico does not allow to be deducted in the same manner. ***See,*** § 7-2-2(B) NMSA 1978. New Mexico then allows certain deductions, such as the federal standard or itemized deductions and deductions for income from federal obligations, to arrive at "net income" upon which income tax is imposed. ***See,*** §§ 7-2-2(N) and 7-2-3 NMSA 1978.

The Internal Revenue Code, hereinafter, "Code", defines federal adjusted gross income to be gross income, less certain deductions which are listed in Section 62 of the Code. Gross income is defined quite broadly in Section 61 of the Code as follows:

> Except as otherwise provided in this subtitle, gross income means *all income from whatever source derived, including (but not limited to) the following items:*
> (1) Compensation for services, including fees, commissions, fringe benefits and similar items;
> (2) Gross income derived from business;
> (3) Gains derived from dealings in property;
> (4) Interest;
> (5) Rents;
> (6) Royalties;
> (7) Dividends;
> (8) Alimony and separate maintenance payments;
> (9) Annuities;
> (10) Income from life insurance and endowments contracts;
> (11) Pensions;
> (12) Income from discharge of indebtedness;
> (13) Distributive share of partnership gross income;
> (14) Income in respect of a decedent; and
> (15) Income from an interest in an estate or trust.

26 U.S.C. § 61 (1997)(emphasis added).

Dr. Nelson first argues that he is not subject to New Mexico personal income tax because it is imposed upon New Mexico residents. He characterizes himself as a citizen, a category which he argues to be a completely different in both character and standing than that of a resident. In his mind, the categories are mutually exclusive and the fact that the legislature did not choose to include citizens among those upon whom the income tax is imposed is dispositive of his liability for tax.

While the concepts of citizenship and residency are not exactly the same, the logical fallacy of Dr. Nelson's argument is to assume that because they are not exactly the same, that they are mutually exclusive. I have not located a provision of the New Mexico

Constitution or a New Mexico statute which defines citizenship for purposes of determining what is required to be a citizen of New Mexico. Black's Law dictionary defines a citizen as follows:

> One who, under the Constitution and laws of the United States, or of a particular state, is a member of the political community, owing allegiance and being entitled to the enjoyment of full civil rights.

Thus, citizenship is broadly defined to encompass members of a political community. One of the ways we, as a society, determine who belongs to a given political community is to look to whether they reside within that community. Thus, residents are often also citizens of a political community and the terms are not mutually exclusive. The definition of resident for purposes of the Income Tax Act adopts the common law approach to residency which ties the concept to domicile. A "resident" is defined for income tax purposes at § 7-1-2 (S) NMSA 1978 as follows:

> 'resident' means any individual who is domiciled in this state during any part of the taxable year; but any individual who, on or before the last day of the taxable year, changed his place of abode to a place without this state with the bona fide intention of continuing actually to abide permanently without this state is not a resident for the purposes of the Income Tax Act.

Regulation 3 NMAC 3.1.9.2 defines a domicile as follows:

> A domicile is a place of a true, fixed home and a permanent establishment to which one intends to return when absent and where a person has voluntarily fixed habitation of self and family with the intention of making a permanent home.

Essentially, a resident of New Mexico is a person who has made New Mexico a permanent home. Residency may encompass individuals who are not necessarily citizens. For instance, there may be foreign nationals who are neither citizens of the United States or

New Mexico, but who are residents of New Mexico because they have made it their permanent home. In spite of the fact that they are not citizens, they are subject to income taxation in New Mexico upon their income earned in New Mexico. Dr. Nelson's fallacy is to assume that because he is a citizen of New Mexico, he cannot also be a resident of New Mexico. It is clear from the evidence in this case that he is a resident. He has made New Mexico his permanent place of abode since 1988. He has voted here. He has a New Mexico driver's license. He maintains a place of business here. Because he is a resident, and because the personal income tax is imposed upon residents with income earned in New Mexico, Dr. Nelson is subject to income taxation by the state of New Mexico.

Dr. Nelson next argues that he had no federal adjusted gross income, which is the starting point under New Mexico's personal income tax system for calculating New Mexico income tax, and therefore, he owes no New Mexico income taxes. He refers to the federal definition of gross income from 26 U.S.C. § 61, quoted above, which, under subsections 1 through 15 list various "items" of income. First, he argues that since it does not specifically mention "income from doing business in New Mexico", that his income would not be included in the definition. This argument is completely without merit. As noted above, the federal definition of gross income is worded quite broadly. It includes, among other things, "(1) compensation for services" and "(2) gross income derived from business." 26 U.S.C. § 61. Dr. Nelson's income falls easily under either of the two categories without straining any interpretation of commonly used English language. The Congressional intent that the language be construed broadly, rather than restrictively, as Dr. Nelson argues is required, is apparent from the wording that states that the listing of items of income includes, "(but is not limited to)" the items listed.

Dr. Nelson's next argument focuses on the language in § 61 of the Code which refers to the listed types of income as "items" of income. Dr. Nelson argues that to determine whether the items of income are taxable, one must determine whether their source was a taxable source. For this, he states that we must refer to 26 CFR 1.861-8(f), which is a regulation promulgated to implement § 861 of the Code. Section 861 of the code is part of Subchapter N, Part 1 of the code, entitled "Source Rules and Other General Rules Relating to Foreign Income" and it specifically deals with income from sources within the United States. Dr. Nelson argues that since his income wasn't from a source listed in the regulation at 26 CFR 1.861-8(f), that his income is not taxable. While reading and interpreting the Internal Revenue Code and its implementing regulations is quite confusing, Dr. Nelson's argument is wrong, once again. Subsection (f) of the regulation 26 CFR 1.861-8, is one part of more than 100 pages of the regulation implementing § 861 of the Code, and it references "other miscellaneous matters". The fact that it doesn't list the source of Dr. Nelson's income is hardly dispositive of this matter. This is especially true, since the statute itself, § 861 of the Code, specifically lists as income from sources within the United States, "compensation for labor or personal services performed in the United States" under § 861(a)(3), a category which clearly encompasses Dr. Nelson's income. The reality is that Dr. Nelson's income was derived wholly from sources within the state of New Mexico, which is within the territorial boundaries of the United States. As such, it was included in federal gross income under either § 61 or § 861 of the Code and is subject to federal income taxation and therefore New Mexico personal income taxation.

Dr. Nelson's last argument is based upon his allegation that he had no federal adjusted gross income which would require him to file a federal return, and New Mexico

only requires those with a federal filing requirement to file a state return. ***See,*** § 7-2-12 NMSA 1978. While it is not disputed that those with a federal filing requirement must file a New Mexico personal income tax return, Dr. Nelson has not proven that he has no federal filing requirement. As indicated in the discussion above, his income from rendering chiropractic services falls within the definition of federal adjusted gross income. While those with income below a certain threshold are not required to file federal returns, Dr. Nelson has not established that his income was below that threshold. Therefore, he has failed in his burden of proof on this issue.

With respect to this issue, Dr. Nelson also relies upon the fact that he sent the Internal Revenue Service or the Department of the Treasury a copy of the affidavit he filed in the records of Bernalillo County which put the Internal Revenue Service on notice of his position that he is not subject to or liable for federal income taxes and he gave the IRS time to respond and rebut his assertions, which they failed to do. Essentially, he argues that this proves that he is not liable for federal income tax and thus would have no requirement to file or pay state taxes. It proves nothing of the sort. All it proves is that the IRS did not respond. It does not prove the truth of his position. This argument is basically an argument that the IRS would be estopped from taking a position to the contrary. Estoppel against the government is highly disfavored, however, especially when the government is acting in its sovereign capacity performing governmental functions. ***Muckey v. N.M. Department of Human Services,*** 102 N.M. 265, 694 P.2d 521 (Ct. App. 1985).

Although Dr. Nelson's arguments with respect to the imposition of income tax have failed, after the hearing it was determined that Dr. Nelson had, in fact, filed New Mexico personal income tax returns for 1989 and 1990 and the record was supplemented with those

returns. Because the Department's assessments for those years were estimates, and because those returns were filed before Dr. Nelson had his epiphany that he was not required to report or pay taxes to New Mexico, I find them to be competent and reliable evidence of Dr. Nelson's true liability for those tax years. For this reason, he has overcome the presumption of correctness with respect to the assessment of income tax for tax years 1989 and 1990 and the Department will be ordered to abate Assessment Nos. 691910 and 691911 in their entirety.

THE DEPARTMENT FAILED TO MEET ITS BURDEN OF PROOF WITH RESPECT TO THE IMPOSITION OF PENALTY FOR FAILURE TO PAY TAX WITH INTENT TO DEFRAUD

The Department assessed a fifty percent of tax penalty, pursuant to § 7-1-69(C) NMSA 1978 (1996 Supp.). This section imposes a penalty for "failure, with intent to defraud the state, to pay when due any amount of tax required to be paid...." Because this section only imposes a penalty for failure to pay tax when it is done "with intent to defraud the state", the ordinary burden of proof, which is on a taxpayer, is shifted to the Department to prove the taxpayer's fraudulent intent. In this case, I do not believe that burden was met. Although Dr. Nelson's arguments were not persuasive, I was not convinced that he did not, himself, believe them to be reasonable arguments. Perhaps most persuasive of Dr. Nelson's belief in the soundness of his arguments was his insistence on litigating this case solely on the merits of the issues he raised, which went only to the propriety of the imposition of tax and not to the amounts assessed. It is possible in the world of law to make arguments which are made in the alternative and are facially in opposition to each other. Dr. Nelson could have presented evidence to rebut the presumption of correctness as to the amount of tax

assessed and still also argued that no tax was due whatsoever on the theories he did present, had he responded to the Department's discovery requests to ascertain his true amounts of gross receipts and taxable income. Yet, he believed sufficiently in the strength of his arguments that he relied upon them entirely for his defense in this case. He will pay a sufficient price, in terms of a tax liability which is higher than it might have been had actual financial records been produced to establish actual income and receipts, such that the imposition of penalty is not warranted. He now has reason to know, however, that those arguments are without merit and, unless this decision is appealed and overturned, he will not be able to continue to act upon those arguments without risking the imposition of a fraud penalty. In this regard, there is a plethora of authority upholding the constitutionality and legality of the imposition of the federal income tax, beginning with the ***Brushaber v. Union Pacific Railroad*** case, cited previously. I would urge him to read that case and others, such as ***Coleman v. Commissioner of Internal Revenue,*** 791 F.2d 68 (7th Cir. 1986) and the many other cases cited therein. I would also ask him to examine this question. If the arguments about the unconstitutionality and illegality of the federal income tax are sound, why is it that he could not cite to a single case which has directly addressed these issues with respect to the imposition of federal income tax and which upheld these arguments? Could it be that the legal arguments propounded by the tax protester movement are motivated more by self interest than by sound legal reasoning which has been recognized and adopted by the courts? Dr. Nelson struck me as an intelligent and sincere man. I would suggest that he has been sold a bill of goods by those in the tax protest

movement. I hope he takes another look at these issues and what is at risk should he continue to pursue this course of action.[3]

CONCLUSIONS OF LAW

1. Dr. Nelson filed timely, written protests to Assessment Nos. 2115295 and 691910-691916 pursuant to § 7-1-24 NMSA 1978, and jurisdiction lies over both the parties and the subject matter of these protests.

2. Dr. Nelson is required by the provisions of § 7-1-12 NMSA 1978 and the regulations promulgated thereunder to register to report and pay gross receipts tax upon his receipts from engaging in business in New Mexico.

3. Dr. Nelson has the burden of proving the Department's lack of jurisdiction to impose tax upon him in defense to any assessment of tax.

4. Dr. Nelson is subject to gross receipts tax on his receipts from the privilege of engaging in the business of performing chiropractic services in New Mexico.

5. New Mexico may constitutionally impose a tax on the privilege of engaging in business in New Mexico.

6. Dr. Nelson failed to overcome the presumption of correctness of Assessment 2115295, except insofar as the penalty portion of the assessment was not subject to the presumption of correctness.

[3] Nothing said herein is intended to dissuade Dr. Nelson from appealing this decision, should he continue to believe that this decision erroneously applies the law. Indeed, that will be Dr. Nelson's obligation should he not wish to abide by the consequences of this decision.

7. Dr. Nelson is liable for Assessment 2115295 even though he retired the identification number under which the assessment was issued.

8. Dr. Nelson was a resident of New Mexico during tax years 1989-1995 and as such, was subject to the imposition of New Mexico personal income tax on income earned from performing chiropractic services in New Mexico during those years.

9. Dr. Nelson overcame the presumption of correctness with respect to the assessment of personal income taxes for tax years 1989 and 1990 and Assessment Nos. 691910 and 691911 should be abated.

10. Dr. Nelson had federal adjusted gross income from the performance of chiropractic services in New Mexico during tax years 1991-1995 and therefore is subject to New Mexico personal income tax for those years.

11. Dr. Nelson failed to meet his burden of proving that he had no filing requirement for federal income taxes for tax years 1991-1995.

12. Dr. Nelson failed to overcome the presumption of correctness of Assessment nos. 691912 through 691916, except with respect to the assessment of penalty to which the presumption of correctness did not apply.

13. The Department has the burden of proving that the 50% fraud penalty imposed pursuant to § 7-1-69(C) NMSA 1978 (1996 Supp.) was warranted in this case.

14. The Department failed to meet its burden of proving that Dr. Nelson failed to pay tax with an intent to defraud the state of New Mexico and the penalty assessment should be abated.

For the following reasons, Dr. Nelson's protest IS HEREBY GRANTED IN PART AND DENIED IN PART. THE DEPARTMENT IS HEREBY ORDERED TO ABATE

ASSESSMENT NOS. 691910 AND 691911 IN THEIR ENTIRETY AND TO ABATE THE PENALTY PORTION OF ASSESSMENT NOS. 691912 THROUGH 691916 AND ASSESSMENT NO. 2115295.

DONE, this 10th day of April, 1998.